Dear CFSC Members:

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Another presentation will focus on key restrictions on the use and disclosure of consumer financial information, including the Gramm-Leach-Bliley Act’s privacy provisions, the California Financial Information Privacy Act, and the Affiliate Marketing Rule. Presenters will also discuss the basis and purpose of the Fair Credit Report Act and the regulation of consumer reporting agencies, users of consumer report information, and furnishers of consumer report information.

Read More...
National Institute - One Lawyer's Story
By Marc VanAdestine, Whyte Hirschboeck Dudek S.C.

As a new lawyer, I was eager to delve into the ever-evolving and complex consumer financial services practice. With the Consumer Financial Protection Bureau recently formed, I contemplated that it would be an exciting and interesting time in the practice area — which also, of course, meant learning and understanding new rules and regulations, in addition to the expansive set governing the industry.

Thankfully, I had the opportunity early in my practice to attend the ABA's Second Annual National Institute on Consumer Financial Basics. The National Institute provided me with a basic understanding of the important regulations in the area that I deal with on a daily basis. This basic understanding allowed me to help tackle our clients' problems and meet their goals more quickly and efficiently. As an added bonus, I met many other wonderful lawyers who I frequently see at other CFS meetings and am now fortunate to call friends. This is a conference that any practitioner first venturing into the consumer financial services world will not want to miss!

Rick Fischer: "Master Builder"
By Rachel F. Marin, Maurice & Needleman, P.C.

Rick Fischer is a partner at the global law firm Morrison & Foerster LLP, which he joined in the 1970s, focusing his practice on financial services with an emphasis on privacy and data security. The recipient of many prestigious awards over the last decade, in 2013 the American College of Consumer Financial Services Lawyers presented him with the "Senator William Proxmire Lifetime Achievement Award," which was an especially meaningful experience because it symbolized peer recognition.

Fischer's clients have included large banks, retailers, insurers, and technology companies. One of his major accomplishments was securing regulatory approval for the first home equity revolving credit product, where Fischer was able to convince the Comptroller of the Currency and the Federal Reserve that the security interests could be perfected to a level sufficient to protect the banks. Another successful project was helping to develop the first securitization of credit card receivables. Fischer has worked on issues involving every piece of consumer legislation that was enacted after 1970, including the Dodd-Frank Wall Street Reform and Consumer Protection Act. Read More...
Planning for Accessibility when Developing Financial Services Websites and Mobile Apps  
By Margo H. K. Tank and R. David Whitaker, BuckleySandler LLP

For most of the population, the continually expanding use of, and reliance on, electronic devices as part of financial transactions has been a largely positive experience. But for those users with disabilities, especially visual or mobility impairment, navigating and using electronic financial services is more of a challenge. Designing websites and mobile applications to offer effective assistance to disabled users is both socially responsible and smart business - and it is the position of the Department of Justice ("DOJ") that it is also required by federal law.

In 2010, the DOJ issued an Advance Notice of Proposed Rulemaking (i) laying out its position that Title III of the Americans with Disabilities Act ("Title III") applies to websites offering products and services to the public, and (ii) soliciting public comment on a series of related questions. Arguably, the DOJ’s position on website accessibility may also apply, by implication, to mobile applications that are used to provide products and services to the public. It has been widely reported that the DOJ’s completion of proposed regulations, based on the ANPRM, has been delayed and may be published sometime in 2013. Read More...

Geolocation and the Law: Where are we today and what direction are we headed in?  
By Mike Shin, Bank of America

Walk along any busy pedestrian street or hop on a crowded commuter bus or train today and you can bet you will find a mobile phone in hand everywhere you turn. Not necessarily up against ears for purposes of conversation but for a multitude of other productive (and sometimes unproductive) uses. The dependence on mobile phones today is the result of, and probably the reason behind, its exponential growth over the last 20 years.

Some numbers to chew on: According to the FCC, the number of mobile phone subscriptions in the U.S. grew from about 3.5 million in 1989 to about 281 million by the end of 2009. And among them, smartphones account for over half of all mobile phones as of mid-2012. In fact, the number of U.S. consumers with a smartphone will more than double from 2011 to 2016, when nearly 60% of the total population will have one according to a 2012 study by eMarketer. Read More...
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We'll have a program on advertising, marketing and sales practices, including a discussion of the Telemarketing Sales Rule and Can Spam.

Another panel will discuss regulations addressing creditor conduct, including debt collection practices, treatment of service members under the service members civil relief act, what constitutes “unfair or deceptive” acts or practices, finishing the discussion off with a crystal ball view of the new “abusive conduct” standard.

Panels will provide a review of small dollar and installment lending, followed by mortgage origination and servicing.

Well known leaders in the consumer financial services industry will school the audience on preemption and fair lending.

We’ll have discussion on payments, prepaid cards and Regulation E, finally ending the substantive legal part of the program focusing on legal remedies.

During the last two hours of the Institute, preeminent consumer and industry advocates will present their perspectives on the future of consumer financial services laws, regulatory and enforcement priorities, and hot topics.
Regulators from the CFPB and FTC will participate in the Institute as panelists with consumer advocates, academics, and industry representatives. The Institute is a “must attend” for anyone new to consumer financial services. Where else can you find some of the most prominent industry leaders opening up the door to consumer financial services law?

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Chair
Consumer Financial Services Committee
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Rick Fischer: “Master Builder”  
*By Rachel F. Marin, Maurice & Needleman, P.C.*

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Fischer’s clients have included large banks, retailers, insurers, and technology companies. One of his major accomplishments was securing regulatory approval for the first home equity revolving credit product, where Fischer was able to convince the Comptroller of the Currency and the Federal Reserve that the security interests could be perfected to a level sufficient to protect the banks. Another successful project was helping to develop the first securitization of credit card receivables. Fischer has worked on issues involving every piece of consumer legislation that was enacted after 1970, including the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Fischer enjoyed growing up in San Francisco, California in the 1950s and 1960s. He noted that the atmosphere of the Haight-Ashbury district (which became famous in the 1960s for its bohemian atmosphere) influenced his outlook on life because it was a very “free” time period in California where people were generally not focused on money, power, or work, and instead were enjoying life and doing good things for others. He never lost this unique perspective.

The oldest boy in a family of 12 children, Fischer became skilled at carpentry after working on projects with his father. The theme of “building” has been constant throughout his life as he went on to help Morrison & Foerster expand on a national and global scale.

Fischer took on leadership roles in his high school, where the administration emphasized student involvement. His class consisted of 64 people and few students sat on the sidelines. Fischer was active in the student council and held office throughout his freshmen, sophomore, and junior years of high school, and he was elected student body president in his senior year. He competed in debates all over the San Francisco Bay area with his school’s speech department, where students were given five to twenty minutes to prepare and then present a debate topic.

Fischer attended college at the University of San Francisco where he had the opportunity to experiment with different intellectual pursuits. He enjoyed logic and philosophy courses, and fell in love with history. When he graduated from college he thought he would eventually teach history at a high school or on the college level, but he decided he needed some time off from school to play golf, enjoy life, and save money. So, after college Fischer spent two years selling casualty insurance for Liberty Mutual and had another job that gave him the opportunity to drive around California, from San Jose to Carmel, Monterey, and Salinas.
Before he went to law school, Fischer had friends who told him about their experiences pursuing a legal education. Fischer was fascinated, although he had no picture of what type of work he would pursue with a law degree. He applied and was accepted to the University of California, Hastings College of the Law. Until that time, he’d never had to put much effort into studying, and he thrived on the challenge law school presented and felt that he “found a home.” He served on the editorial board of the Hastings Law Journal and was elected to the Order of the Coif, a national law school honorary society founded for the purposes of encouraging legal scholarship and advancing the ethical standards of the legal profession. Fischer found that the successful people worked hard not only on their own behalf, but also on behalf of others.

During law school, Fischer enjoyed the two summers he spent working for large law firms, Gibson Dunn & Crutcher in Los Angeles and Pillsbury Winthrop Shaw Pittman LLP (formerly Pillsbury, Madison & Sutro) in San Francisco, and he decided he wanted to practice at a big law firm. He was then approached by Morrison & Foerster LLP, which at the time was a small firm consisting of less than twenty attorneys. Fischer initially resisted the firm’s recruiting efforts. However, the partner recruiting him, Robert Raven, would not take “no” for an answer. Raven presented the opportunity to Fischer as a chance to grow with a promising firm. Raven impressed him so much that he accepted the job. Raven went on to become president of the State Bar of California and then the American Bar Association. When Fischer started at Morrison & Foerster he was lawyer number 33, and now the firm consists of over 1,000 lawyers.

One of Fischer’s first assignments at Morrison & Foerster was to work with an association comprised of five major banks on developing the first multi-bank credit card system called Master Charge. Master Charge competed with Bank of America’s BankAmericard, and eventually became MasterCard. During Fischer’s first month at Morrison & Foerster, a senior business lawyer handed him copy of a newly enacted statute, the Fair Credit Reporting Act (“FCRA”), and asked him to summarize it for a client, the California Bankers Association. The senior lawyer told Fischer to limit the amount of time he spent on the summary because he did not think it would be a significant statute. To the contrary, Fischer has consistently worked on issues relating to the FCRA over his last four decades of law practice. He also took on the responsibility of working with about 350 card issuers to develop credit card agreements with certain disclosures and to ensure that each complied with the FCRA, Truth-in-Lending Act, and state laws. Practicing law in California was particularly interesting because it is a very progressive state, and he had the opportunity to testify before the state legislature in Sacramento.

In 1976, Fischer helped to address a growing consumer privacy issue that his clients faced. Government agencies were using banks to obtain customer information in connection with investigations by using search warrants to view customer files. The staff of Congressional Representative John Cavanaugh of Nebraska contacted Fischer regarding the Representative’s proposed legislation, the Right to Financial Privacy Act, and asked him to testify at a Congressional hearing. The hearing was scheduled for the following morning in Washington, D.C. so Fischer jumped on a red eye flight from San Francisco and flew to the Nation’s Capital, preparing his testimony on the plane. Testifying was an exhilarating experience. In addition to testifying, he worked with the Representative’s staff to draft legislation and he spoke with
members of Congress to convince them of the importance of the legislation which would balance the needs of law enforcement with the need to protect the privacy of individuals. In 1978 Congress enacted the Right to Financial Privacy Act. The first two chapters of Fischer’s seminal treatise, “The Law of Financial Privacy,” addressed the FCRA and the Right to Financial Privacy Act.

In 1979 Morrison & Foerster asked Fischer and four other attorneys to move to Washington, D.C. to open an office for the firm. In the last eight years, the firm had grown to include about 400 attorneys. In his San Francisco office, Fischer had enjoyed a beautiful office space, and on clear days he could see the Farallon Islands, which were about six miles off the coast. When Fischer first walked into the Washington, D.C. office, it was cluttered with boxes floor to ceiling, and the offices had no good view from the windows. Despite the change of scenery and the hard work it took to get an office up and running, Fischer recognized this challenge to “build” an office starting from the ground up as a personal opportunity for success. He quickly adapted to life in D.C., and became a “policy junkie,” testifying in front of the House and Senate and preparing witnesses to testify on several occasions. In March 2012, he testified before a Senate Committee on the structure and oversight of the prepaid card market.

After successfully opening the Washington, D.C. office and working to develop a Los Angeles office, Fischer helped Morrison & Foerster open offices in New York City in 1980, Hong Kong in 1982, and Tokyo in 1986. During those years he commuted to Asia several times a month and also worked on projects in London. He remembers spending more time on airplanes than sleeping in a bed.

Fischer learned that opening and managing successful offices requires the help of many of people. He credits the success of the firm’s offices in part to his ability to identify good people, get them involved, delegate to them as much responsibility as they could handle, and then “get out of the way.” Fischer introduced the lawyers working in the new offices to clients, and then he stepped aside to give them the room to succeed. This was not the easiest thing to do as the inclination for many attorneys is to hold onto clients and keep colleagues in the background to elevate one’s own position. While some of the attorneys whose careers Fischer helped to develop left the firm, Fischer still believes in his strategy of letting colleagues shine on their own.

Fischer has had several mentors during his career, including Roland Brandel, Barkley Clark, and Ralph Rohner. Fischer recalled that as a third year associate he had “talked himself” onto a Practicing Law Institute panel. He was assigned to speak about consumer class actions, a topic which he knew little about because he was on the business side of law practice rather than litigation. Fischer found himself sitting on the panel in a room full of lawyers at a hotel in Chicago, and he was terrified. Barkley Clark could see Fischer was shaking as he waited for his turn to speak, and Clark told Fischer, “If you could not do this you would not be up here.” Those words eased Fischer’s fears, and he went on to do well on his presentation. Since then he has presented on hundreds of panels and has taught courses at several well respected law schools.

Fischer has been a distance runner since 1973, and he still runs a total of five to ten miles per day on his way to and from work in Washington, D.C. He likes to play golf and read books, especially books about history (fiction and non-fiction) and authors like Tom Clancy, among
others. Fischer loves to spend time with his family, and he is proud of his children and grandchildren. His daughter is a veterinarian, his oldest son is a fireman in Washington D.C., and his youngest son works on video games as a music engineer. Fischer has always enjoyed physical work and has found that it is good for the spirit. In addition to living in Washington, D.C., he maintains a 50 acre property near the Blue Ridge Mountains in Virginia, and still likes using a chain saw and a wood splitter.

Fischer would give young lawyers three pieces of advice. The first is to work really hard. One cannot possibly work too hard during the first five to eight years of law practice, which should be spent educating one’s self and making one’s reputation. The second piece of advice is to recognize opportunities and pursue them, because good opportunities are limited in quantity. The final piece of advice is to spend time building business relationships by doing things that one enjoys.

Fischer’s ability to “build” helped his firm successfully expand, and it also helped to shape the development of financial services law in the United States.

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Planning for Accessibility when Developing Financial Services Websites and Mobile Apps

Margo H. K. Tank, Partner, BuckleySandler LLP
R. David Whitaker, Counsel, BuckleySandler LLP

For most of the population, the continually expanding use of, and reliance on, electronic devices as part of financial transactions has been a largely positive experience. But for those users with disabilities, especially visual or mobility impairment, navigating and using electronic financial services is more of a challenge. Designing websites and mobile applications to offer effective assistance to disabled users is both socially responsible and smart business – and it is the position of the Department of Justice (“DOJ”) that it is also required by federal law.

In 2010, the DOJ issued an Advance Notice of Proposed Rulemaking1 (i) laying out its position that Title III of the Americans with Disabilities Act (“Title III”) applies to websites offering products and services to the public, and (ii) soliciting public comment on a series of related questions. Arguably, the DOJ’s position on website accessibility may also apply, by implication, to mobile applications that are used to provide products and services to the public. It has been widely reported that the DOJ’s completion of proposed regulations, based on the ANPRM, has been delayed and may be published sometime in 2013.2

The DOJ’s ANPRM identifies two key sets of standards for website accessibility:
- The Web Content Accessibility Guidelines 2.03 (“W3C Guidelines”), and
- The Electronic and Information Technology Accessibility Standards published by the U.S. Access Board4 for federal government agencies (and those vendors contracting with them), under the authority of Section 508 of the Rehabilitation Act of 1973 (“Section 508 Standards”).5

W3C Guidelines

The W3C Guidelines are published by the World Wide Web Consortium, which describes itself as “an international community that develops open standards to ensure the long-term growth of the Web.” The W3C Guidelines establish standards for web accessibility at three different levels – A, AA, and AAA. The DOJ indicated in the ANPRM that it generally regards compliance with the AA standards as satisfying the requirements of Title III.6 This does not mean, however, that

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1Advance Notice of Proposed Rulemaking, 75 Fed Reg 43460 (July 26, 2010).
3Available at http://www.w3.org/TR/WCAG.
436 CFR 1194.
529 USC 794(d).
6Advance Notice of Proposed Rulemaking, 75 Fed Reg at 43465.
the DOJ will view AA compliance as strictly required in all cases. The ANPRM also discussed the possible adoption by the DOJ of independently-developed performance-based standards, rather than the W3C’s more technical standards.\footnote{Id.} In addition, the W3C Guidelines themselves suggest that exceptions to compliance with various AA standards may be justified on several different grounds, including:

- Complying with the standard will interfere with the purpose of the website (e.g. allowing additional time to complete a timed test); or
- Complying with the standard requires a technology upgrade that is not immediately feasible (either for financial or technical reasons), provided that a good faith effort is being made to address the feasibility of upgrading and that progress can be demonstrated.

It is also not clear if the DOJ will consider the AA standard applicable to ancillary or non-essential features of the website that do not directly affect access to the offered products and services (e.g. failure to provide an action narrative for an optional how-to video, as opposed to a failure to provide a screen-reader friendly version of a required disclosure).

Whether or not the AA standards are ultimately officially adopted by the DOJ as part of a regulatory mandate, it makes sense for businesses offering their products and services electronically to take these standards into account. The following are examples of the key requirements in the AA standards that website and mobile application developers should consider:

- All text presented on the page is screen-reader compatible. Imaged text (text that is a graphic, rather than a screen-readable character) is not used except for non-material messages, such as ancillary messages promoting additional products or services.
- Text can be cleanly resized up to 200%.
- Certain non-text content for which it is not practical to provide a text alternative is handled as follows:
  - Controls and inputs have a text name that described its purpose.
  - Audio and video files are accompanied by a brief text description of their content (see additional requirements below).
  - Tests that would be invalid if presented as text include a text description of what the test is.
  - CAPTCHA: Text descriptions are provided and alternative CAPTCHA\footnote{“CAPTCHA” is a challenge-response test used to confirm that the response is not generated by a computer. One example is the visual presentation of distorted letters that the user has to re-type.} techniques are available to accommodate visual and physical disabilities.
  - Decorative and formatting elements do not interfere with the operation of screen readers, screen magnifiers, text-to-speech software, speech recognition software, and alternative keyboards and pointing devices.
• Pre-recorded audio/video is captioned, and a text transcript of the audio portion is available that can be discovered and used by screen readers and text-to-speech software. This may be less necessary for audio/video that is not material to understanding or using the product or service.

• The structure and relationship of materials on the page can be determined through the use of programmatic structures (such as semantic mark-up) or through text description.

• Correct sequences on the page for both reading and filling in information can be programmatically determined, and are preserved when using alternative navigation devices and screen readers.

• The instructions for using the page and its contents do no rely solely on color, shape, size, location on the page, or sound.

• Automatically triggered audio should be avoided, or if used, should either be capable of being paused or should have a volume control separate from other audio.

• All functionality on the page is operable through a keyboard without requiring specific timings for individual keystrokes. The keyboard operable interface includes a visual “focus indicator” to indicate where on the page the keyboard is currently focused and active. “Keyboard traps” should be avoided and the method for moving keyboard focus from one page element to another should either be (i) an arrow or tab key, or (ii) described on the page.

• Any time limits or “time out” functions can either be (i) turned off, (ii) adjusted or (iii) extended after a warning (at least ten extensions allowed).

• Moving, blinking, or scrolling information that starts automatically should be capable of being paused or stopped. Auto-updating that happens in parallel with presentation of other content should be capable of being paused or stopped, unless it is essential. Flashing messages, if used at all, should not flash more than three times a second.

• The purpose of each hyperlink can be clearly determined from its label or accompanying information. There should be alternate ways to locate any particular web page within a set of web pages, unless the page is part of a sequenced process.

• The language being used for any content on the page can be programmatically determined, except for proper names and technical terms.

• Navigation mechanisms and identification of components on a set of web pages with the same functionality are consistently identified.

• Instructions are provided whenever user input is required, and errors that are automatically detected are flagged and described. For legal or financial transactions, user-submitted date should be either reversible, checked for input errors, or reviewed and confirmed by the user before submission.

• Text has a contrast ratio of 4.5:1 (excluding incidental text and branding).

• Captions are provided for live audio.

• Audio description is provided for pre-recorded video.
It may not be possible to implement all of the AA standards in all cases. But as a general rule businesses that are attempting to comply with the AA standards should be encouraging their website developers to factor them into website and app design whenever feasible.

Section 508 Standards

Assuming that a financial services provider wishes to be eligible for opportunities to contract with the federal government, its customer-facing interface for any website associated with services provided to, or on behalf of, the federal government will need to comply with Sections 1194.22 and 1194.31 of the Section 508 standards. A mobile app will also need to comply with Section 1194.21. These requirements overlap, but in some ways are more specific, than the requirements of the W3C Guidelines. The U.S. Access Board has made extensive tools available to assist businesses with Section 508 compliance at www.Section508.gov.

Accessibility Tools in Mobile Device Operating Systems

The operating systems for the major mobile device platforms (Apple, Android and Blackberry) all provide built-in tools to enhance accessibility. These include tools for functions like:

- Screen reading
- Re-sizing text and images
- Guided sequences for reading and filling in information
- Keyboard focus indicators (where the keyboard is active on the screen)
- Color inversion
- Page navigation

As a general rule, a mobile app developer seeking to create an app that will likely meet the DOJ’s enforcement standards should strive to (i) take advantage of all of the accessibility features built into the operating systems for each platform it supports, and (ii) design its applications so that they do not interfere with, or disable, any of the accessibility adjustments or tools made available to phone users through the applicable operating system. In addition, to the extent applicable in a mobile environment, the AA standard of the W3C Guidelines should also be considered—recognizing that some of those standards may not be relevant to a mobile environment.

Conclusion

In today’s environment, the inclusion of accessibility tools in the structure of public-facing websites and mobile apps should usually be a significant consideration in the development process. At the beginning of any development project, providers of electronic financial products and services should establish a clear expectation that the final work product will be designed for accessibility, and then monitor progress towards meeting that expectation. In promoting accessibility, providers and developers alike are well advised to assume that the closer the work
product comes to meeting the W3C AA standards and the requirements of Section 508, the less likely it is that a regulator or user will claim that there has been a violation of the ADA.
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Smartphones have become such an ingrained element of our daily lives that we use them for talking, emailing, taking photos, playing music, gaming, social networking, shopping, and of course, paying bills and banking. The transformative benefits of mobile technology have been obvious, and the level of data access and sharing by consumers and businesses that it enables can be eye-opening to say the least. This immense amount of data access, along with the always-on, always-on-me nature of mobile brings with it concerns about the protection of mobile users’ privacy by consumers, lawmakers, watchdog groups, regulators and many others.

This article surveys the recent and ongoing efforts by government agencies, regulators and legislators to call attention to one particular growth area in mobile technology over the last few years: Geolocation. As many in the consumer financial services sector know, no other channel has experienced higher demand than mobile as more and more consumers are preferring to transact wherever and whenever they want from the convenience of their handheld device. One of the critical tools in providing mobile-based services has been geolocation data, whether it is used to service a customer looking for nearby bank branches or ATMs, or collected to help detect and prevent fraud by the institution.

What is Geolocation?

Have you recently looked up your local weather on your phone, used it for turn-by-turn directions, or requested nearby restaurant suggestions through your smartphone app? If so, chances are that your precise whereabouts (more accurately, that of your device) were first obtained by the app in order to provide the requested service. Through GPS and other wireless technologies (e.g., cell tower signals, Wi-Fi access point technology, crowd-sourced positioning), smartphones allow us to use location-based services like Google Maps, Foursquare or Yelp just to name a few household apps. The popularity and pervasiveness of geolocation use on smartphone apps was evidenced by a February 2012 Pew Research Center study that found that three-fourths of smartphone users were using such services. Consumers have certainly not been the only beneficiaries of location data however. Geolocation enables mobile companies to collect and share location data to provide and enhance their services, boost revenue by delivering targeted advertising, and help create user profiles for analytics by aggregating and storing individual user data.

As the utility and momentum of geolocation use by consumers and mobile industry participants grew increasingly apparent, it also became a vanguard issue for privacy advocates and regulators who
were concerned about how companies who provide location-based services use and share location data, how well they inform consumers of such use, and the potential for abuse if that data was compromised or used in ways that was not intended or authorized, including consumer profiling, identity theft, surveillance and stalking.

The U.S. Government Accountability Office issued a report in September 2012 focused on mobile device location data, highlighting that federal agencies can, and should, do more to protect location data privacy of mobile users.1 While recognizing efforts by the National Telecommunications and Information Administration to bring industry, advocacy and government stakeholders together to develop codes of conduct to address internet consumer privacy issues, the GAO pointed out the lack of goal-setting, milestones and performance measures for the effort, even questioning whether mobile location privacy issues would ultimately be addressed. Similarly, the GAO’s report commended the FTC for having issued some guidance addressing mobile location privacy issues, but recommended that more comprehensive guidance be issued by the agency to better inform companies of appropriate actions to take in order to protect consumers’ mobile location data.

FTC Report on Mobile Privacy

In response to the GAO’s findings, the FTC released its staff report entitled Mobile Privacy Disclosures: Building Trust Through Transparency in February 2013.2 In it they recognized the vast amount of user data being transferred between and among mobile platforms, operating system providers, app developers and others off their mobile devices, including geolocation information. The report underscored the need for heightened transparency pertaining to privacy disclosures and policies across the mobile industry in order to convey meaningful privacy information to consumers. One of their points of emphasis stemming from the GAO report was on the collection of mobile geolocation data, which the agency deemed within the elevated category of sensitive information.

To ensure consumers are made fully aware of an app’s use, collection and sharing of geolocation data, the report recommended mobile platforms and app developers provide just-in-time disclosures to consumers and obtain affirmative consent before an app can access such data. According to the report, “providing such a disclosure at the point in time when it matters to consumers, just prior to the collection of such information by apps, will allow users to make informed choices about whether to allow the collection of such information.” Additionally, the FTC in their report recommended that mobile platforms like Apple and Google Android continue to apply the use of recognizable icons (the directional arrow for Apple, and the crosshairs symbol for Android) to depict the transmission of geolocation data for consumers, as well as continued use of a privacy “dashboard” approach which provides an easy way for consumers to determine which apps have access to which type of data including geolocation, and to edit the choices made about the data being collected at the individual app level.

California Attorney General’s Guidelines for Mobile Privacy

Right about the same time the FTC’s report on mobile privacy disclosures was issued, the Attorney General’s Office for the State of California in January 2013 released its own set of privacy guidelines for the mobile landscape titled Privacy On The Go.3 In seeming lockstep with the FTC, the California AG’s guidance classified geolocation data gathered by a mobile app from one’s mobile device as sensitive information, or “personally identifiable data about which users are likely to be concerned.” Similar to the FTC report, the guidance recommended greater transparency on the part of platforms and app developers when it comes to privacy practices by utilizing a “surprise minimization”
approach and supplementing general privacy policies with enhanced measures to alert users and give
greater control over data practices that involve sensitive information. To ensure that consumers are
made aware of an app’s accessing of sensitive data such as geolocation, the guidance recommended
the use of special notices provided to the user when the app collects or uses such data. Like just-in-
time disclosures under the FTC’s recommendations, special notices should be delivered in context, just
before the specific data is being collected, explaining the intended uses and any third parties to whom
the data would be disclosed. These special notices are meant to provide an easy way for users to
choose whether or not to allow the collection or use of the data.

Amendment to COPPA

Historically, children have been viewed as a vulnerable category of consumers when it comes to
online personal data collection. For that reason the Children’s Online Privacy Protection Act of 1998
(COPPA) was passed which required operators of websites or online services directed at, or knowingly
used by, children under 13 to give notice to parents and obtain verifiable consent before collecting,
using or disclosing personal information from their children. Due to the explosion and popularity of
mobile apps and location-based services since the time the law was enacted, the FTC under its
rulemaking authority amended COPPA in December 2012 by augmenting the list of “personal
information” collected by apps that trigger parental notice and consent requirements to now include
gelocation. The amendment becomes effective on July 1 of this year.

Movement in Congress

On the federal legislative front, there have been efforts in Congress to introduce new legislation
that would safeguard mobile geolocation data of consumers from unwarranted access by law
enforcement, as well as unauthorized access by commercial entities. Sponsored by Senator Al
Franken, the Location Privacy Protection Act of 2012 in particular would prohibit all app makers and
other companies from collecting, receiving, recording, obtaining, or disclosing geolocation information
from an electronic communications device without the user’s express authorization.4 His first attempt at
getting the bill through Congress failed in 2011, but in late 2012 the bill passed the Senate Judiciary
Committee and Senator Franken announced his intent to reintroduce the bill during the 113th Congress
later this year. Should this bill pass both houses of Congress into law, it would represent a significant
step in digital privacy legislation from lawmakers.

“Hyperlocal” Tracking

In just the last couple of years, Senator Chuck Schumer,5 and more recently, Senator Franken6,
each spearheaded separate inquiries into another innovation involving geolocation that has made
technology headlines: physical movement tracking using mobile device signals. This technology
offered by a handful of competing startups enables brick and mortar businesses to measure and track
foot traffic in and around designated areas, i.e., hyperlocal tracking, just from the wireless signals
emanating from mobile devices and strategically placed receivers within a store that pick up those
signals. Even though personal information and device identifiers are masked through data aggregation
and anonymization, retailers would still be able to utilize the data for analytic purposes in order to better
understand customer preferences, make changes to marketing strategies, and improve in-store layouts.

These lawmakers along with other privacy advocates have expressed heightened concerns
over numerous issues with the practice, not the least of which the fact that location data is being
gathered from mobile device users without their awareness or consent. Despite the posting of in-store notices alerting customers to the practice, and providing the ability to opt-out of such tracking either by turning off one’s device Wi-Fi signal or going to the operator’s website, Senators Schumer and Franken remained steadfast in calling for an informed, customer opt-in approach to tracking as the only way to adequately inform and capture consent from consumers and meet the standard of privacy they have come to expect. Yet today, without formal legislation or rules dictating otherwise, hyperlocal tracking continues to take place in participating shopping centers and retail stores without requiring consumer opt-in.

Conclusion

The mobile landscape is and will continue to be a center of boundless opportunity, growth and possibilities covering a spectrum of daily activities. As technology developers, consumers and businesses continue to explore, dwell and thrive within that space, lawmakers are finding that increasingly more of its attention and focus must also go in that direction. Geolocation in particular has become a lightning rod issue in mobile in the last few years for both its utility in mobile apps and the privacy risks that come along with collecting that form of data. What may have once been the proverbial “wild west” with minimal regulation is slowly but surely shifting based on the government strides described above and any future developments in legislation and rulemaking that impact the space. But given the rapid clip of mobile innovation versus the deliberate, tooth-and-nail pace in Washington and state capitols everywhere, it’s unclear if regulation will ever be able to keep up. Where things go from here for geolocation is somewhere even the best GPS-enabled device may have trouble determining.

Footnotes